Calendar No. 567

97TH CONGRESS, 2d Session | SENATE | REPORT No. 97-399

AMENDING SECTION 8(e) OF THE SMALL BUSINESS ACT (PROVISIONS RELATING TO THE NOTICE OF FEDERAL PROCUREMENT ACTIONS)

MAY 18 (legislative day MAY 11), 1982.—Ordered to be printed

Mr. WEICKER, from the Committee on Small Business, submitted the following

REPORT

[To accompany S. 1947]

The Committee on Small Business, to which was referred the bill (S. 1947) to amend section 8(e) of the Small Business Act, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

I. COMMITTEE CONSIDERATIONS

S. 1947, a bill to amend section 8(e) of the Small Business Act, to improve small business access to Federal procurement information, was introduced by Senator Lowell Weicker, Jr., on December 11, 1981. Senator Sam Nunn, Ranking Minority Member and seven other Members of this Committee were original cosponsors of the legislation.

On February 17, 1982, the Subcommittee on Advocacy and the Future of Small Business, chaired by Senator S. I. Hayakawa, conducted a hearing on the bill in San Diego, Calif. The full committee conducted a second legislative hearing on the bill in Washington on March 4, 1982.

At these hearings, the committee received testimony from small business owners who routinely use the Commerce Business Daily (CBD). Additionally, officials from the Office of Federal Procurement Policy, the Department of Commerce and the Small Business Administration presented their views on the legislation. The editor of the Commerce Business Daily and the U.S. Public Printer testified about the mechanics and costs involved in compiling, publishing and distributing the document.

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On April 28, 1982, Senator Specter and several Members of this Committee introduced S. 2446, the "Small Business Reform Act of 1982." Like S. 1947, section 4 of that bill also would amend section 8(e) of the Small Business Act. However, the bills differ in that S. 2466 would require a 45 day period for the bidding process on federal contracts and would empower the Secretary of Commerce to investigate and implement alternative means of notifying small businesses about upcoming procurement actions. The Committee did not have an opportunity to fully consider the germane provisions of this bill during its executive session. However, some of the testimony the Committee received did address provisions incorporated in the Specter bill.

The Committee met in Executive session on May 13, 1982, and, with a quorum present, adopted two amendments and ordered favorably reported S. 1947 with an amendment in the nature of a substitute.

Senators Levin and Nunn introduced an amendment to require the head of a procuring activity to approve the commencement of sole source negotiations for procurements in excess of $100,000. The amendment also requires the procuring agency to consider all timely responses to the notice of intent to contract on a sole source basis. The amendment was adopted by voice vote.

Senator Levin offered a second amendment to strike the exemption from the time limits established in the Committee's amendment for professional service contracts, as well as the exemption for contracts awarded to educational institutions. The amendment was adopted by a rollcall vote.

The committee amendment, as reported, is as follows:

Strike all after the enacting clause and insert the following:

That (a) section 8(e) of the Small Business Act is amended to read as follows:

"(e)(1) It shall be the duty of the Secretary of Commerce, and the Secretary is hereby empowered, to obtain notice of all proposed competitive and noncompetitive defense procurement actions of $10,000 and above, and all competitive and noncompetitive civilian procurement actions of $5,000 and above, from any Federal department, establishment or agency engaged in procurement of property, supplies and services in the United States; and to publicize such notices in the daily publication "Commerce Business Daily", immediately after the necessity for the procurement is established: Provided, That nothing in this paragraph shall require publication of such notices with respect to those procurements (A) which for security reasons are of a classified nature, or (B) which are for utility services and the procuring agency in accordance with applicable law has predetermined the utility concern to whom the award will be made, or (C) which are made from another Government department or agency, or a mandatory source of supply, or (D) in which only foreign sources are to be solicited, or (E) which are determined in writing by the head of the agency, with the concurrence of the Administrator, that advance publicity is not appropriate or reasonable.

"(2) Except as provided in paragraph (3), whenever a procuring activity is required to publish notice of procurement actions pursuant to paragraph (1) of this subsection, such activity may not—

"(A) issue a solicitation until at least fifteen days have elapsed from the date of publication of a proper notice of the action in the Commerce Business Daily, except where the solicitation will be for procurement of requirements classified as research or development effort, in which case until at least forty-five days have elapsed from the date of such publication; or

"(B) foreclose competition until at least thirty days have elapsed from either (i) the date of issuance of the solicitation, or (ii) in the case of orders under a basic agreement, basic ordering agreement, or similar arrangement, the date of publication of a proper notice of intent to place the order; or

"(C) commence negotiations for the award of a sole source contract until at least thirty days have elapsed from the date of publication of a proper notice of intent to contract that provides such specifications and informa-

tion as practicable regarding the service or performance, and that interested persons are invited to respond or submit proposals in response to such notices within such period of time.

"(3) Nothing in paragraph (2) shall require compliance with any such minimum periods if—

"(A) the procurement action is to be made by an order placed under an existing contract; or

"(B) the procuring activity determines in advance in writing on a case-by-case basis that, with respect to any such procurement action (i) it is of such unusual and compelling emergency that the Government would be seriously injured if the time periods in paragraph (2) were complied with; or (ii) it involves perishable subsistence supplies and it is determined that it is impracticable to comply with such minimum periods.

"(4) Notwithstanding any other provision of law, a procuring activity may not enter into negotiations for the award of a sole source contract for more than $100,000 unless—

(A) the head of the procuring activity has approved the proposal to negotiate such a contract; and

(B) the procuring activity has considered all responses to the notice of procurement action as required in paragraph (2) of this subsection.

"(5) As used in this section, the term 'sole source contract' means a contract for the purchase of property, supplies or services which is entered into or proposed to be entered into by an agency after soliciting or negotiating with only one source.".

(b) The amendments made by this Act shall apply with respect to procurement actions to be initiated forty-five days after the date of enactment of this Act.

II. Legislative History

A. PUBLIC LAW 87–305

Public Law 87–305, enacted on September 26, 1961, amended section 8 of the Small Business Act by adding a new subsection (e). That law empowers the Secretary of Commerce to obtain and publish notice of all proposed defense procurement actions in excess of $10,000, and all civilian procurement actions above $5,000. The statute further directs the Secretary to publish these procurement notices daily in the "United States Department of Commerce Synopsis of the United States Government Proposed Procurements, Sales and Contract Awards" a publication now known as the Commerce Business Daily or "CBD". The law also enumerates ten exceptions to the requirements for publication of those procurement actions.

By enacting Public Law 87–305, the Congress clearly expressed its interest in having Federal procuring agencies provide the business community with information concerning upcoming government contracting opportunities. The provisions contained in subsection 8(e) are fully consistent with Congressional policy contained in section 2(a) of the Small Business Act, which states:

> It is the declared policy of the Congress that the Government should aid, counsel, assist and protect, insofar as possible, the interests of small-business concerns in order to preserve free competitive enterprise, *to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the government . . . be placed with small business enterprises, to insure that a fair proportion of the total sales of government property be made to such enterprises,* and to maintain and strengthen the overall economy of the Nation. (Emphasis added.)

This committee repeatedly has concurred with these findings, and reaffirmed its commitment to these principles from the outset of its considertaion of S. 1947.

EVALUATION OF THE COMMERCE BUSINESS DAILY

Consistent with the objectives of Public Law 87–305, the purpose of the Commerce Business Daily is to provide U.S. business in general, and small business in particular, with pertinent information about federal procurement actions, which will total more than $110 billion in fiscal year 1982.

Prior to the enactment of Public Law 87–305 in 1961, the Commerce Business Daily was primarily used as an administrative tool, designed to assist Department of Commerce personnel in keeping the business community informed about Federal procurement actions. It was originally produced in mimeograph form, and distributed at no cost through Department of Commerce field offices on an ad hoc basis. The Government Printing Office (GPO) eventually assumed the publication and distribution functions related to the Commerce Business Daily, although all editorial functions have remained within the jurisdiction of the Department of Commerce.

Currently, the Commerce Business Daily editorial staff process an average of 800 procurement actions each business day, or about 200,000 procurement notices per year. Annual subscriptions have steadily increased over the years and today number approximately 40,000.

Currently, the annual Commerce Business Daily subscription rate is $175 for first class or priority mail, and $100 for regular or domestic mail. Subscription fees cover all direct and administrative costs incurred by the GPO in publishing and mailing the Commerce Business Daily, including a fifty percent surcharge imposed by the Public Printer. The annual Department of Commerce administrative and editorial costs of approximately $1 million are not covered by subscription fees, but are included in the agency's congressionally appropriated funds.

In recent years, the format of the Commerce Business Daily has also been expanded to include notice of congressionally sponsored procurement seminars and other general business news.

C. PROCUREMENT AGENCY COMPLIANCE WITH COMMERCE BUSINESS DAILY REGULATIONS

The Federal Procurement Regulations (FPR section 1, part 10) and the Defense Acquisition Regulations (DAR section 1, part 10) govern advertising in the Commerce Business Daily and provide for the regulatory implementation of Public Law 87–305.

Like the statute, these regulations delineate ten exemptions to the general requirement for publishing advance notice of procurement actions in the Commerce Business Daily. For all procurements that require advance notice, however, the regulations state, as a general rule, that procuring activities should publicize proposed procurements 10 calendar days before issuance of the invitations for bids or request for proposals.

The regulations also require that after solicitations have been made available, bidding time should not be less than twenty calendar days for the procurement of standard commercial articles or services. For other than standard commercial items, the regulations require that bidding time be not less than thirty calendar days from the time a solicitation is issued. These minimum bidding regulations apply only to formally advertised contracts; there are no time limits established in regulations for negotiated contracts, even though such contracts represent the bulk of federal purchases.

The Defense Acquisition Regulations and the Federal Procurement Regulations also govern other aspects of advertising in the Commerce Business Daily, by providing guidelines to agencies on the preparation and transmittal of procurement synopses, and by specifying the classification codes used in synopses to identify and compartmentalize broad procurement categories.

Each procuring agency is responsible for complying with the regulations in their entirety. Yet, during the committee's hearings on S. 1947, witnesses (from the Federal agencies and the small business community) repeatedly noted that the regulations are only partially complied with, or at times, are totally ignored, by procuring agencies. Several small business owners who regularly use the Commerce Business Daily informed the committee that all too often, synopses appear too late to permit an interested company to prepare and submit a timely bid or proposal. They added that this problem is compounded when synopses contain inadequate information, or are "misfiled" in the Commerce Business Daily. As one small business contractor summarized at the San Diego field hearing:

> If published synposes contain insufficient information, then the time required to make further inquiries of the procuring agency can consume bidding deadlines. If I have to hunt through the entire publication, instead of the sections that pertain to my line of business, the value of the CBD to my company is greatly reduced.

The committee also learned that even when notices are complete and "proper," mail delays further reduce the time bidders have to respond. This problem is particularly acute for companies located great distances from Chicago, where the Commerce Business Daily is printed and mailed. While some delays can be attributed to those subscribers who choose to have mail delivered by other than first class, even "priority" subscribers have expressed similar concern about the "timeliness" of notices that are contained in the CBD.

Another common complaint centered around agency abuse of the exemptions from advertising in the Commerce Business Daily. Several small business witnesses testified that they believed many more procurements should be advertised under the provisions of the law than actually appear.

When questioned by the committee about synposes that violate the minimum time periods, the senior Department of Commerce official responsible for the preparation of the Commerce Business Daily attributed the variation between regulatory policy and agency practice to "time escape clauses" which are also provided for in the regulations. He added that in his view the Department has no "enforcement"

authority over the procuring agencies to compel adherence to the regulatory timetables, and that the Commerce Business Daily staff has no actual control over procuring agency notices that are submitted beyond the regulatory guidelines established.

Another witness reported that although the Small Business Administration SBA periodically issues surveillance reports on agency compliance with the Commerce Business Daily requirements, these reports are ignored as often as the regulations themselves.

The Administrator of the Office of Federal Procurement Policy (OFPP) admitted that enforcement of the Commerce Business Daily regulations was indeed difficult. Yet, he advocated administratively strengthening the existing regulations as the best method for improving the "timeliness" problems described by the small business witnesses.

D. NEED FOR LEGISLATIVE CHANGES

Small businesses continue to experience difficulty in obtaining their fair share of the federal procurement dollar. Unable to support large marketing staffs to deal with geographically dispersed government purchasing offices, most small firms are almost totally dependent on the synopses published in the Commerce Business Daily as their means of obtaining procurement information. The synopses of contracting opportunities published by the Government are a vital source of information for small businesses if received in sufficient time, and with sufficient detail.

However, as previously discussed, the committee heard from witness after witness during its hearings on S. 1947, that current regulatory guidelines are not sufficient to ensure either the timeliness, or the accuracy, of information published in the Commerce Business Daily. Unlike the administration, the committee views further regulatory requirements as ineffective unless they are backed by statute. Accordingly, the committee believes it is necessary to enact legislation establishing new minimum time periods for publication of, and bidding on, all Federal contracts. The committee also maintains that it is necessary to clarify the existing statutory exemptions to publication of synopses in the Commerce Business Daily, so as to maximize the usefulness of the document to the procurement community at large, and decrease the likelihood of the misuse of the exemptions by procuring agencies.

In the committee's view, the small business person who is ready, willing, and able to participate in the Federal procurement process will benefit from an improved and expanded version of the Commerce Business Daily because it should open up additional procurement opportunities for that business. The Government will benefit because of the increased participation by small business in federal procurement, and because it will have the opportunity to increase its sources of supply. The taxpayer will benefit because increased competition in Federal purchases increases the likelihood that high quality goods and services will be procured at the lowest possible price.

E. PROPOSAL FOR A UNIFORM FEDERAL PROCUREMENT SYSTEM

Since as early as 1972, with the enactment of legislation establishing the joint Congressional-Executive-private sector "Commission on

Government Procurement," Congress has been concerned about the complexities of the Federal procurement system. At least twice, in Public Law 95–507 (legislation providing comprehensive revisions to many of the Small Business Administration's procurement and minority business programs) and Public Law 96–400 (legislation reauthorizing the Office of Federal Procurement Policy), Congress has directed the executive branch to review the Federal procurement process in total, and to recommend a uniform, simplified procurement system that removes antiquated provisions, and standardizes to the maximum extent practicable the procurement activities of the military and civilian agencies.

In response to those statutory mandates to streamline and simplify the Federal Procurement System, the Office of Federal Procurement Policy recently submitted to the Congress its "Proposal for a Uniform Federal Procurement System" (FPS).

In addition, the OFPP proposal recommends changes to the Commerce Business Daily provisions contained in section 8(e) of the Small Business Act.

The proposal calls for a standardization of the two separate dollar thresholds contained in current law. The OFPP proposal also would require that a notice be published of contract awards in excess of the revised standard small purchase procedure ceiling proposed by the Administration ($25,000). If the Administrator of the Small Business Administration (SBA) concurs, the notice of award need not be published if the procuring agency determines that such notice is inappropriate or unreasonable.

In addition, the proposal clarifies that Commerce Business Daily notices encompasses all competitive and noncompetitive procurement actions in excess of the threshold that do not otherwise qualify for an exemption to publication.

The Executive Branch proposal also recommends that the two existing exemptions from publication (relating to procurements of personal or professional services, and services from educational institutions) be dropped. In OFPP's view, "experience has shown that such procurements are appropriate for notice."

Finally, while the proposed revisions to section 8(e) recommend the inclusion of broad language that would make it clear that potential bidders are to be provided "sufficient time in which to submit bids in response to a published notice," the FPS does not address in statute what that "sufficient time" should be.

As of the committee's markup, the executive branch had not yet submitted its full legislative proposal for implementation of the FPS recommendations. Although some congressional hearings have been held on the "concepts" contained in the OFPP draft, to date no other legislative action has been taken on this proposal.

III. Explanation of Committee Amendment

A. PUBLICATION

The committee amendment basically restates existing law concerning the publication of proposed procurement actions in the Commerce Business Daily. Specifically, the committee amendment em-

powers the Secretary of Commerce to obtain and publish all proposed competitive and noncompetitive procurements for property, supplies and services by the U.S. Government. The committee retains the current advertising thresholds of $10,000 for defense procurements and $5,000 for civilian procurements. The committee amendment then enumerates five instances where Federal agencies would not be required to advertise procurement actions in the Commerce Business Daily. The provisions relating to the publication of proposed federal procurement actions differ only slightly from existing law.

The committee has added the words "competitive and noncompetitive" to modify the term "procurement actions" in order to clarify that all Federal procurement actions are subject to publication. In the committee's view, the addition of these words is necessary to clarify that its publication requirements extend to both formally advertised and negotiated procurement actions. Testimony received during the hearings on S. 1947 revealed that some Federal procuring agencies interpret the existing law to apply only to formally advertised procurements. Neither the existing statute, the regulations or the committee's amendment support this view.

On this point, the committee amendment is identical to the recommendation of the Office of Federal Procurement Policy in its proposal for a Uniform Federal Procurement System.

The committee amendment also adds the word "property" to the list of procurements that must be advertised. This action simply standardizes the publication provisions contained in section 8(e) of the Small Business Act with the two major Federal procurement statutes (the Armed Services Procurement Act and the Federal Property and Administrative Services Act), and the current implementing regulations relating to the Commerce Business Daily and those two laws.

The committee retained five exemptions to publication in the Commerce Business Daily. In the committee's view, there are legitimate circumstances under which any notice could either be harmful to the Government's interest, or provide no real contracting or subcontracting opportunities for the private business sector to warrant publication.

The first exemption contained in the committee amendment refers to procurements that, for security reasons, are classified. The committee intends the term "for security reasons" to mean both the Nation's military security and the personal security of the Nation's inhabitants, or where disclosure of the Government's interest in the property, supply or service would compromise the national security. This exemption is identical to that contained in existing law.

The second exemption from advertising contained in the committee amendment refers to the procurement of utility services where, based on applicable law, the procuring agency has predetermined the utility to whom the award will be made. The committee does not believe that there is a necessity for advertising procurements that must legally be awarded to predetermined sources. This exemption is identical to that contained in existing law.

The third exemption from the publication of notice refers to procurement actions between Federal agencies or from a mandatory source of supply. Again, the committee does not believe that there is any special advantage to publishing these procurement actions since there is

no likelihood of significant contracting or subcontracting opportunities for the private sector. This exemption is identical to existing law.

The fourth exemption from publication in the Commerce Business Daily refers to those procurement actions in which only foreign sources are to be solicited. The committee does not believe that the U.S. business community would benefit from notice of such procurements, since no U.S. company would be eligible to bid on contracts let under these requirements. This exemption is identical to existing law.

The last exemption from publication contained in the committee amendment permits the head of an agency to determine in writing that it is not appropriate or reasonable to publish notice for a specific procurement action. That procurement then would be exempt from the advertising requirements only if the Administrator of the Small Business Administration (SBA) concurs that it is indeed unreasonable or inappropriate to publish the notice of the procurement action in question. According to the SBA, this exemption, which is virtually identical to existing law, has been used only four times in the last 10 years. On three of those occasions, the SBA did not concur with the procuring agency in its request for a waiver of the advance notice of the procurement action. On the only other occasion, relating to a Justice Department contract to transfer Federal prisoners, the SBA agreed that notice was inappropriate and gave its concurrence to forego public notice of the procurement.

The committee does not believe that the last exemption will be, or should be, widely used. Rather, the exemption has been maintained to cover highly unusual procurement situations that have not been specifically exempted elsewhere, but for which a legitimate exemption could be, and under this exemption would be, documented, and subsequently granted.

This provision differs from current law only in the requirement that the "head of the agency" as opposed to the "procuring agency" make the request for an exemption to the SBA Administrator.

The committee amendment does not contain the five additional exemptions from publication in the Commerce Business Daily which exist in current law. However, the committee does deal with these other exemptions under the section of its amendment that establishes minimum time periods for advertising in the Commerce Business Daily.

B. TIME LIMITS

The committee amendment establishes minimum time periods for those procurement actions that must be advertised in the Commerce Business Daily. The committee amendment also provides five instances where a procurement could be exempt from the time periods established by this legislation. However, an exemption from the time periods does not equate to an exemption from the requirement to publish the notice of the procurement action in the Commerce Business Daily, even on a postaward basis.

The committee amendment establishes a statutory time period for advance notice of procurement actions. Specifically, the amendment provides a 15-day time period from the date on which a synopsis in the Commerce Business Daily to the date on which solicitations can be made available to prospective bidders. The 15-day time period repre-

sents a 5-day increase over the current practice of providing 10 days between the date of synopsis and the date that the solicitations are made available to the public.

A considerable amount of testimony was received by the committee from Government and public sector witnesses alike, who acknowledged that procuring agencies tend to ignore the current ten day regulatory requirement. Given the additional time problems regularly caused by delays in the receipt of the Commerce Business Daily, the committee believes that the additional 5-day period is necessary to provide small firms with adequate time to review the Commerce Business Daily for potential opportunities and to request appropriate documents from the agency. In the committee's view, the addition of 5 days between notice and issuance of a solicitation will not negatively impact on the Federal procurement process; potential problems which may arise because of the application of the minimum time periods to any particular procurement action can be accommodated by an agency's use of one of the exemptions from the time requirements provided for in the amendment.

Even within the general rule of providing a 15-day interval between publication of a notice of procurement action and the issuance of a solicitation, the committee amendment recognizes that when a solicitation is for procurements that can be categorized (the use of the term "classified" in the text of the amendment does not refer to any prohibition from disclosure) as "research or development efforts," the interval between publication of a proper notice and the issuance of the solicitation shall be at least 45 days. In the committee's view, and based on discussions with many senior procurement officials in those agencies that contract extensively for research and development work, the 40-day minimum will not present any problem in meeting such needs. Frequently, in fact, agencies' research efforts are known months, and even years, in advance. Of course, in that most highly unusual of circumstances where the 45-day period might present difficulties for a particular research or development procurement action, the exemptions from the time limits provided for in the committee amendment would still be available.

The second time limit established in the committee amendment generally provides for a 30-day time period between the date that a solicitation is made available and the date on which bidding can be foreclosed. Unlike existing regulations, the committee amendment does not differentiate between standard commercial and nonstandard procurements; unless otherwise exempted by the committee amendment, all competitive procurements requiring publication under this provision must provide at least 30 days for a prospective bidder to prepare and submit a bid or offer.

While the committee recognizes that advertising for and procurement of architect-engineer services operates somewhat differently from that of other competitively negotiated procurements, it intends that the notice provisions of this legislation fully apply to the procurement of architect-engineer services.

Of course, to the extent possible, the committee would encourage agencies to make a considerably longer period of time available between publication of notice and issuance of a solicitation or between the time a solicitation is made available and the date on which bidding

can be foreclosed. Rarely does an agency's procurement requirement not lend itself to sufficient lead time to provide the maximum practicable opportunities for competition.

Since increased competition on Government contracts is essential to economic stability and the national security, the Committee intends to review, in a larger context than permitted by this legislation, whether federal agencies' actions are providing a greater, fairer and more open procurement process for the small business community in particular, and the entire procurement sector generally.

1. Basic Ordering Agreements

The committee amendment provides that an agency may not foreclose competition for orders placed against basic ordering agreements and similar arrangements for 30 days after the date of publication of a notice of intent to place the order. Basic ordering agreements are opene-nded agreements between a Government agency and a contractor against which specific orders for specific items and services may be placed. They are entered into for the mutual convenience of the Government and the contractor.

Current procurement regulations caution that such arrangements should not be used to avoid the requirement for maximum competition. However, during the committee's consideration of S. 1947, witnesses pointed out that there is great potential for using such agreements to circumvent the mandates of the legislation. The Committee believes that a 30-day time limit between publication of a synopsis and placement of an order will permit other potential suppliers to make their existence, interest and capabilities known to the procuring activity.

There appears to be some confusion in administrative practice concerning whether and when orders against basic ordering agreements are to be synopsized in the Commerce Business Daily. Basic ordering agreements and similar arrangements are not contracts. (See Defense Acquisition Regulation 3–410.1 and 3–410.2). Therefore, they do not qualify for the existing statutory exemption for procurement actions "which are made by an order placed under an existing contract." Under current regulations, orders under these agreements can be synopsized in the Commerce Business Daily only ten days before competition is foreclosed. The committee believes that this is too little time. By specifically addressing them, the committee amendment clarifies that basic ordering agreements and similar arrangements should be synopsized and when that synopsis should appear.

2. Noncompetitive Procurement Actions

With the inclusion of the requirement that procuring activities publish notice of all competitive and noncompetitive procurement actions in the Commerce Business Daily unless otherwise exempt, the committee recognized that separate treatment for the sole-source awards had to be provided for in its amendment.

Under the terms of the committee amendment, where a procuring activity is required to publish notice of a procurement action, it may not commence negotiations for the award of a sole-source contract until at least 30 days have elapsed from the date of publication notice of intent to contract. The 30-day time period here is intended to serve the same purpose as the 30-day time period provided for competitive procurements.

The notice of intent to contract that is to be published in the Commerce Business Daily is to include, in addition to such other information as the Secretary of Commerce determines to be appropriate for all other such notices, such specifications and information as practicable regarding the service or performance to be procured.

Without such information, the procuring community has no basis for determining the nature and needs of the Federal agency, or to learn whether business concerns may have the capacity and interest to participate in future, similar procurements.

The committee amendment further provides that, with respect to a proposed sole source negotiation, the notice to be included in the Commerce Business Daily shall also state, in addition to the requirements established by the Secretary or other provisions of this paragraph, that interested parties are invited to respond, or submit proposals in response to such notice, within the agency's time periods established in accordance with this legislation.

In the committee's view, this provision will have at least two salutory effects. First, it will provide the procurement community with notice that the Federal Government is involved in a certain type of procurement. Under current law, many of these procurement actions are not publicly advertised. Disclosure will assist potential suppliers by giving them notice of possible subcontracting opportunities on this or future requirements.

For the Government, it will provide a means for simple outreach to the private sector to inquire about the interest and capability of other firms to meet the procurement needs of the agency. Increased competition, or multiple sources for Federal use, will help reduce the relative cost of federal procurement activities.

C. EXEMPTIONS FROM TIME LIMITS

The committee recognizes that not all Federal procurement actions can be dealt with in the general 45-day time period provided for in the committee amendment, i.e., 15 days for the general solicitation process (except for research and development) and 30 days for the bidding process or before commencing negotiations for the award of a sole-source contract. Therefore, the committee has provided several exemptions applicable to either competitive or noncompetitive procurements from the time limits contained in the committee amendment, and has established general procedures for using them.

First, the committee amendment provides that, if an action is to be made by an order placed under an existing contract, the procuring activity need not adhere to either the time limits applicable for the issuance of a solicitation, or the time limits for foreclosing competition, or the time limits for commencing negotiations. Simply, the committee recognizes that it is unlikely that such a procurement action would provide any reasonable competitive contracting opportunities, or serve a public benefit to draw attention to the specific contract.

However, the committee would expect that the procurement action to enter into the initial contractual relationship would, unless otherwise exempt by the terms of the committee amendment, be subject to full compliance with the minimum time periods established by this proposal.

The committee amendment establishes a second set of exemptions from the general time limits established by the bill, and outlines procedures for their use.

When a procuring activity determines that one of these exemptions applies, and an agency determines that it intends to take advantage of such an exemption, the contracting officer must so determine in writing and place the written determination in the contract or negotiation file. The agency may then proceed with that single procurement action according to the time frame suitable to it. However, the agency must still publish the synopsis in the Commerce Business Daily, stating that the time periods required cannot or will not be complied with, and then identify the time the agency has determined to be made available, for bids or negotiation. In the event a procurement is extremely urgent, the synopsis may appear after the contract has been awarded, but the committee intends that this procedure be used only in the most extreme situations.

The committee does not believe it necessary to further burden the procurement system with filings and published notice of this determination. But, the committee expects that the written determination and justifications for claiming the exempion woutld be readily available to any interested person (regardless of their apparent capability to perform). Access to the documentation, in lieu of a more onerous procedure, should provide a sufficient oversight mechanism to determine the adequacy and appropriateness of agencies' utilization of the exemptions.

The first exemption established by the committee in this part provides that when the procuring activity determines that the procurement is of such unusual and compelling emergency that the government would be harmed if either of the time limits were observed, neither of the time periods need be observed. The committee cautions the procuring agencies to use this exemption only when absolutely needed, to engage in sufficient procurement planning to enable the agency to comply with the time periods provided in this bill, and to permit the procurement community and the public to benefit from the increased competition expected to be generated by the committee amendment.

The second exemption from the new minimum time periods contained in this part is for the procurement of perishable goods. The committee recognizes that perishable goods cannot always be subjected to the time periods established in the committee amendment. However, the committee also realizes that many procuring agencies contract for perishable goods on a yearly basis, and then place orders against those annual contracts. In this latter case, the contract itself is certainly not perishable, and because substantial savings could be realized if such contracts were advertised annually, and the bids entered into competitively, the committee has maintained this exemption as an exception only from to the time limits, and not from publication. Except for the application of the time periods, the language is similar to existing law.

During the committee's consideration of this legislation, it deleted two exemptions in current law: the exemption for personal and professional services, and the exemption for awards made to educational institutions. The committee believes that many of the contracts awarded in these two categories can and should be let competitively,

and, therefore, made the decision not to exempt these provisions from publication. The Office of Federal Procurement Policy concurs with the committee's decision in these instances, stating in its "Proposal for a Uniform Federal Procurement Policy":

> The provisions which exempt the procurement of personal or professional services or services from educational institutions from the notice requirement are deleted because experience has shown that such procurements are appropriate for notice.

The committee amendment also includes a provision that prohibits a procuring activity from entering into a sole source contract in excess of $100,000 unless the head of the procuring activity approves the proposal to negotiate such a contract, and the procuring activity has considered all responses to the notice of procurement action which the legislation establishes.

The effect of this provision is to provide greater internal agency review of significant sole source awards to insure that the use of a noncompetitive process is in the best interest of the Government.

A provision similar to this amendment passed the Senate in 1981, and was again included in the Senate Armed Services Committee in the 1983 Department of Defense Authorization bill for the military services. A recent GAO study has shown that sole source contracting is a governmentwide problem affecting both the civilian and the defense agencies.

The committee amendment also provides a definition of the term "sole source contract."

Finally, the committee amendment provides that its amendments shall apply only with respect to procurements actions initiated 45 days after the date of enactment of these changes. Such delay in implementation should permit sufficient time for procurement authorities to inform the procurement officials of the requirements contained in this proposal.

IV. Other Issues Considered by the Committee

Although the committee focused primarily on the establishment of minimum time periods for publication of, and bidding on, government contracts, several other issues relating to the Commerce Business Daily were raised during the committee's consideration of S. 1947.

A. INADEQUATE SYNOPSES

For example, small business owners testified that procurement notices published in the Commerce Business Daily are often incomplete or contain inaccurate information. They reported that synopses frequently do not fully describe the product or service being bought; or when offers are due; or from whom further information is available. Small business witnesses pointed out that such defects detract from the utility of the Commerce Business Daily, and, in case where time is short, can destroy any benefit to subscribing to the Commerce Business Daily.

The problems caused by publication of deficient synopses are compounded when the notice appears under the wrong classification or contains coding errors, (i.e., the failure to correctly note in the publication which actions may be set-aside or sole source procurements).

Accordingly, the committee has specified in its amendment that the new time limits are tied to a "proper notice", in the Commerce Business Daily. A synopsis which does not give prospective offerors adequate notice or information should not be considered "proper". In the opinion of the committee, the precise content of a proper notice is a matter best left, for the present, to regulation.

However, among the most obvious elements of a "proper" synopsis that should be provided to the Commerce Department, by the procuring agencies, and included in each item published in the Commerce Business Daily, are the name and telephone number of an appropriate agency official to contact regarding the procurement action. The testimony before the committee is replete with examples of businesses who had simple, often procedural questions relating to the basic elements of the solicitation and having nothing to do with any intent to obtain advance, or inside information. Without the name of a contact person in the agency, and a telephone number for that knowledgeable official, potential bidders have spent considerable time, and money, seeking answers to questions raised by the synopsis.

The committee is aware that the current regulations provide for the inclusion of the name and address of the contracting office, and believes an extension of this regulatory provision to include the name and telephone number of an appropriate official to be a simple change to make.

The committee does not agree with the comments from one of the agencies that publication of the name and telephone number of the contracting officer "might well lead to his being burdened with numerous and lengthy telephone inquiries about the procurement."

The Commerce Business Daily synopsis is a brief summary of a procurement action. Lengthy calls would be unlikely, or could be dealt with easily by the recommendation that an interested party await the release of a solicitation or scope of work statement. Furthermore, section 223 of Public Law 95–507, requires a Federal agency to provide to any small business concern upon its request a copy of the bid set and specifications, and the "name and telephone number of an employee . . . to answer questions with respect to such contract." The committee is not aware of any complaint by the procuring agencies that this statutory requirement is leading to a contracting officer being "burdened with numerous and lengthy telephone inquiries about the procurement."

The committee expects the Department of Commerce to take a vigorous leadership role in ensuring that published synopses meet a minimum informational standard. The Department should also develop a standardized, easy-to-understand format for use by the agencies in their preparation of synopses. The committee believes that proper editorial direction provided by the Department of Commerce will assist both the procuring agencies preparing synopses, and the contractors who rely on them.

B. IMPACT OF S. 1947 ON THE FEDERAL PROCUREMENT SYSTEM

The committee solicited written comments from the major procuring agencies so that it could properly and fully consider the impact of S. 1947, as introduced, on agency internal procurement operations.

Several agencies responded that S. 1947, as introduced, would not provide the necessary flexibility for shorter bidding times when required by unusual circumstances. The committee believes this concern has been adequately addressed in its amendment to S. 1947. The legislation specifically provides that, as with current law, certain procurement actions need not be published at all in the Commerce Business Daily. Procurements needed in other types of emergencies, or under other circumstances specified in the amendment, can be exempted from the time limits established in S. 1947 if the procuring agency so determines in writing in advance. The agency must then publish the synopses, specifying time limits that are unique to that particular procurement. The agency can even publish the synopses after the contract is awarded, if the circumstances so dictate.

Several agencies also expressed the view that the addition of minimum time periods could significantly lengthen procurement leadtimes. However, the committee also received testimony that indicated that the miniscule additional lead-time required by S. 1947 would have virtually no effect on the final stages of the procurement action that could not be accommodated within the parameters of the committee amendment, and would be insignificant when compared to the typical, several month, life-cycle of most procurement actions.

The committee is of the opinion that S. 1947 would not unnecessarily delay procurements, if properly implemented. Adequate advance procurement planning by Federal agencies should enable synopses to be transmitted for publication in the Commerce Business Daily sufficiently early to avoid potential delays, or to avoid any complications with the time periods established in this legislation.

C. IMPACT OF S. 1947 ON THE PUBLICATION OF THE COMMERCE BUSINESS DAILY

The committee does not believe S. 1947, even as amended, will have a significant impact on the production of the Commerce Business Daily.

When questioned specifically by the committee, a Department of Commerce spokesperson responded that S. 1947 would not have a negative effect on the production of the publication. Similarly, the Public Printer informed the committee that a significant increase in the number of solicitation notices would not impede the timely publication of the Commerce Business Daily.

The costs of production to GPO of an expanded Commerce Business Daily would increase based on the number of pages in each edition. Most of the increases would be reflected in increased subscription prices. The Government Printing Office estimates that its incremental cost increases would be as follows:

The following chart is an estimate of the incremental production costs to the GPO (for printing, binding, and distribution—excluding postage). Current issues often contain 32 pages.

Pages:	Cost to GPO
24	$3,116
28	3,347
32	3,820
36	4,527
40	4,711
44	4,891
48	5,074
52	5,254
56	5,437
60	5,617
64	5,801

The GPO estimates that the incremental costs increases to subscribers would be as follows:

Pages	Subscription cost	Rounded subscription cost
24	$171	$175
28	174	175
32	179	180
36	187	190
40	189	190
44	191	195
48	240	240
52	241	245
56	244	245
60	246	250
64	248	250

The significant increase in the subscription price of a Commerce Business Daily of between 44 and 48 pages is due to the increases in postage rates between 2 ounces and 3 ounces. These prices include the recent 10-percent across-the-board price increase, and are subject to further modification as that price increase is permanently factored into the pricing formula.

Nevertheless, small business witnesses repeatedly told the Committee that they would be willing to pay more for the Commerce Business Daily if the publication were more timely, and more accurate. They objected, however, to across-the-board subscription increases if the quality of the Commerce Business Daily were not improved.

The committee believes that enactment of S. 1947, as amended, will significantly improve the timeliness of the Commerce Business Daily. The committee also believes the quality and utility of the synopses will improve if the Department of Commerce takes an aggressive role in monitoring their uniformity and content.

D. ALTERNATIVE MEANS FOR PUBLISHING AND DISSEMINATING THE COMMERCE BUSINESS DAILY

During the consideration of S. 1947, the committee received testimony concerning requests to authorize alternative methods for printing and disseminating the Commerce Business Daily.

The Department of Commerce spokesperson discussed several innovative proposals for electronic transmittal of the information contained in the Commerce Business Daily. He reported that GPO now provides the Department with magnetic tapes of daily issues. the first step towards testing the Commerce Business Daily Data Retrieval

Program. This project contemplates on line computer retrieval of all, or part, of the present Commerce Business Daily hardcopy data base.

The Commerce Department anticipates that an electronic edition of the Commerce Business Daily would make it possible for businesses to access the procurement information contained in the publication through office or home computers. Such a system could make the Commerce Business Daily available on a category-by-category basis which would enable companies to subscribe to only those categories in which they do business. The electronic access method has been demonstrated on a test basis in Michigan and Oklahoma, where it has received an enthusiastic reception from the small business community.

The Department of Commerce and the GPO are working together to develop other innovative approaches to publishing the Commerce Business Daily. For example, the possibility of printing the publication simultaneously in two or more locations is the subject of a current (GPO) feasibility study. Several small business witnesses testified in support of this proposal as a way of reducing the delays that ensue when the publication is distributed from a single mass mailing location in Chicago.

The Department of Commerce and the GPO also are studying the feasibility of printing the entire publication outside of the government. Technical proposals are currently being solicited from the private sector so that these agencies can better analyze the costs and benefits of contracting outside of the government for printing the Commerce Business Daily. However, neither agency contemplates transferring the information processing or editorial functions relating to the Commerce Business Daily.

This committee encourages all those concerned to continue their efforts towards improving the printing and transmittal of the Commerce Business Daily. The committee believes that such activities will ultimately benefit the small firms that utilize the publication by reducing mail delays and reducing subscription costs if the publication is made available in alternative ways. However, the committee is taking no action with respect to these proposals at this time.

V. Section-by-Section Analysis

The committee amendment consists of two new subsections which amend section 8(a) of the Small Business Act.

New paragraph (e)(1) empowers the Secretary of Commerce to obtain and publish advance notice of all competitive and non-competitive defense procurement actions in excess of $10,000 and all competitive and noncompetitive civilian procurement actions above $5,000 in the "Commerce Business Daily."

This new paragraph also provides five exemptions (subparagraphs (A) through (E)) from the requirement to publish advance notice of procurement actions. The new provision: (A) exempts procurement actions that are classified for security reasons; (B) exempts procurement actions for utility services, which in accordance with applicable laws, have been predetermined; (C) exempts procurement actions between Government agencies or those procurement actions that must be procured from a mandatory source of supply; (D) exempts those procurement actions in which only foreign sources are to be solicited; and (E) exempts procurement actions that the head of an agency, with the

concurrence with the Administrator of the Small Business Administration, determines are inappropriate or unreasonable to publish.

New paragraph (e)(2) establishes two time periods to which agencies must adhere when they are required to publish procurement notices pursuant to paragraph (e)(1). Subparagraph (A) stipulates that a federal agency may not issue a solicitation until at least fifteen days have elapsed from the date of publication of the procurement action in the Commerce Business Daily; or, in the case of research and development efforts, the agency may not issue a solicitation until at least 45 days have elapsed from the date of such publication.

Subparagraph (e)(2)(B) provides that an agency cannot foreclose competition until at least 30 days have elapsed (i) from the date of issuance of the solicitation or (ii) in the case of basic ordering agreements, at least 30 days have elapsed from the date of publication of a proper notice of intent to place an order.

Subparagraph (e)(2)(C) provides that an agency cannot commence negotiations for the award of a sole source contract until at least 30 days have elapsed from the date of publication of the notice of intent to contract. This subparagraph also provides that the notice shall also provide such specifications and information as practicable regarding the agency's intentions to contract, and state that all interested persons are invited to respond or submit proposals within the specified time period.

New paragraph (e)(3) stipulates that the time periods specified in paragraph (e)(2) shall not apply if (A) the procurement action is to be made by an order placed under an existing contract; or (B) if the procuring agency determines in advance, in writing, on a case-by-case basis, that such procurements are (i) of such an unusual or compelling emergency that the government's interests would be harmed if the time periods were observed; or (ii) the procurement action involves perishable subsistence supplies and it is impracticable to comply with the minimum time periods.

New subparagraph (e)(D) provides that a procuring activity may not enter into negotiations for the award of a sole source contract in excess of $100,000 unless the head of the procuring agency approves the proposal to negotiate. It also requires the procuring activity to consider all responses to procurement notices established in the legislation before awarding sole source contracts in excess of $100,000.

New paragraph (e)(5) defines a sole source contract for purposes of this section.

Section (b) of the committee amendment provides that the amendments made by this legislation to the Small Business Act shall only apply to procurement actions initiated 45 days after enactment.

VI. Matters Required To Be Discussed Under Senate Rules

A. COMMITTEE VOTE

In compliance with rule XXVI(7)(B) of the Standing Rules of the Senate, the following rollcall votes were recorded:

On the motion to adopt the Levin amendment to delete contracts for professional services and contracts to educational institutions from

the list of permissible exemptions from the time periods established in the bill.

AYES	NAYS
BOSCHWITZ	WEICKER*
GORTON*	HATCH*
NICKLES	D'AMATO*
RUDMAN	
NUNN	
HUDDLESTON	
BUMPERS*	
SASSER*	
BAUCUS*	
LEVIN	
DIXON	

*Indicates a vote by proxy.

On the motion to favorably report S. 1947, a bill to amend the Small Business Act to improve small business access to Federal procurement information, with an amendment in the nature of a substitute:

AYES	NAYS
WEICKER	
PACKWOOD*	
HATCH*	
HAYAKAWA	
BOSCHWITZ	
GORTON*	
NICKLES	
RUDMAN	
D'AMATO	
NUNN	
HUDDLESTON	
BUMPERS*	
SASSER*	
BAUCUS*	
LEVIN	
TSONGAS*	
DIXON	

*Indicates a vote by proxy.

B. COST OF THE LEGISLATION

In compliance with rule XXVI of the Standing Rule of the Senate, the committee estimates that the cost of the legislation will be equal to the amounts indicated by the Congressional Budget Office in the following letter:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 17, 1982.

Hon. LOWELL P. WEICKER, Jr.,
Chairman, Committee on Small Business, U.S. Senate, 424 Russell Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S.

1947, a bill to improve small business access to federal procurement information, as ordered reported by the Senate Committee on Small Business, May 13, 1982.

S. 1947 would make a number of changes to the federal procurement process. It would extend the length of time available to contractors to respond to federal procurement solicitations, and allow fewer exemptions from the requirement to publish notices in the Commerce Business Daily (CBD). The additional publishing costs, which are not expected to be significant, would be recovered through increases in subscription rates. Agencies also would likely have a greater number of notices to prepare, and would require a longer lead time to publish and award contracts according to the requirements of S. 1947. According to the Office of Federal Procurement Policy (OFPP), the greater number of notices would result in an additional workload to these agencies, including evaluating additional responses, but lower-priced contract awards resulting from the increased competition would likely offset any additional administrative costs.

In addition, S. 1947 would require the approval of the head of the procuring activities before a sole-source contract exceeding $100,000 could be awarded. According to the OFPP, roughly 10,000 additional contracts throughout the federal government, but particularly in the Department of Defense, would require this approval. It is not possible at this time to precisely estimate the costs associated with this provision, however.

Should the committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

C. REGULATORY IMPACT STATEMENT

In compliance with rule XXVI(11(b) of the Standing Rules of the Senate, it is the opinion of the committee that no significant additional regulatory impact would be incurred in carrying out the provisions of the legislation. Nor does the committee believe that the bill would have an additional impact on the privacy of companies or individuals who utilize the Commerce Business Daily.

In the opinion of the committee, enactment of this bill will not result in additional paperwork requirements for those who utilize the Commerce Business Daily.

VII. CHANGES IN EXISTING LAW

In compliance with rule XXVI(12) of the Standing Rules of the Senate, changes in existing law made by the statutory provisions of the bill are as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, and existing law in which no change is proposed is shown in roman):

SEC. 8 * * *

[(e) It shall be the duty of the Secretary of Commerce, and he is hereby empowered, to obtain notice of all proposed defense procurement actions of $10,000 and above, and all civilian procurement actions of $5,000 and above, from any Federal department, establishment, or

agency engaged in procurement of supplies and services in the United States; and to publicize such notices in the daily publication "United States Department of Commerce Synopsis of the United States Government Proposed Procurements, Sales, and Contract Awards", immediately after the necessity for the procurement is established; except that nothing herein shall require publication of such notices with respect to those procurements (1) which for security reasons are of a classified nature, or (2) which involve perishable subsistence supplies, or (3) which are for utility services and the procurring agency in accordance with applicable law has predetermined the utility concern to whom the award will be made, or (4) which are of such unusual and compelling emergency that the Government would be seriously injured if bids or offers were permitted to be made more than 15 days after the issuance of the invitation for bids or solicitation for proposals, or (5) which are made by an order placed under an existing contract, or (6) which are made from another Government department or agency, or a mandatory source of supply, or (7) which are for personal or professional services, or (8) which are for services from educational institutions, or (9) in which only foreign sources are to be solicited, or (10) for which it is determined in writing by the procuring agency, with the concurrence of the Administrator, that advance publicity is not appropriate or reasonable.]

That (a) section 8(e) of the Small Business Act is amended to read as follows:

"(e)(1) It shall be the duty of the Secretary of Commerce, and the Secretary is hereby empowered, to obtain notice of all proposed competitive and noncompetitive defense procurement actions of $10,000 and above, and all competitive and noncompetitive civilian procurement actions of $5,000 and above, from any Federal department, establishment or agency engaged in procurement of property, supplies and services in the United States; and to publicize such notices in the daily publication "Commerce Business Daily", immediately after the necessity for the procurement is established: Provided, That nothing in this paragraph shall require publication of such notices with respect to those procurements (A) which for security reasons are of a classified nature, or (B) which are for utility services and the procuring agency in accordance with applicable law has predetermined the utility concern to whom the award will be made, or (C) which are made from another Government department or agency, or a mandatory source of supply, or (D) in which only foreign sources are to be solicited, or (E) which are determined in writing by the head of the agency, with the concurrence of the Administrator, that advance publicity is not appropriate or reasonable.

"(2) Except as provided in paragraph (3), whenever a procuring activity is required to publish notice of procurement actions pursuant to paragraph (1) of this subsection, such activity may not—

"(A) issue a solicitation until at least fifteen days have elapsed from the date of publication of a proper notice of the action in the Commerce Business Daily, except where the solicitation will be for procurement of requirements classified as research or development effort, in which case until at least forty-five days have elapsed from the date of such publication; or

"(B) foreclose competition until at least thirty days have elapsed from either (i) the date of issuance of the solicitation, or (ii) in the case of orders under a basic agreement, basic ordering agreement, or similar arrangement, the date of publication of a proper notice of intent to place the order; or

"(C) commence negotiations for the award of a sole source contract until at least thirty days have elapsed from the date of publication of a proper notice of intent to contract that provides such specifications and information as practicable regarding the service or performance, and that interested persons are invited to respond or submit proposals in response to such notices within such period of time.

"(3) Nothing in paragraph (2) shall require compliance with any such minimum periods if—

"(A) the procurement action is to be made by an order placed under an existing contract; or

"(B) the procuring activity determines in advance in writing on a case-by-case basis that, with respect to any such procurement action (i) it is of such unusual and compelling emergency that the Government would be seriously injured if the time periods in paragraph (2) were complied with; or (ii) it involves perishable subsistence supplies and it is determined that it is impracticable to comply with such minimum periods.

"(4) Notwithstanding any other provision of law, a procuring activity may not enter into negotiations for the award of a sole source contract for more than $100,000 unless—

(A) the head of the procuring activity has approved the proposal to negotiate such a contract; and

(B) the procuring activity has considered all responses to the notice of procurement action as required in paragraph (2) of this subsection.

"(5) As used in this section, the term 'sole source contract' means a contract for the purchase of property, supplies or services which is entered into or proposed to be entered into by an agency after soliciting or negotiating with only one source.".

(b) The amendments made by this Act shall apply with respect to procurement actions to be initiated forty-five days after the date of enactment of this Act.

O